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The Importance of the Thin Conception of the Rule of Law for International Development: A Decision-Theoretic Account

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Abstract: The rule of law is frequently claimed to be an important factor – if not a necessary element – for advancing international development. Among the development goals conformity with the rule of law has been thought to advance are economic growth, legal compliance, and respect for human dignity. Yet, as many commentators have observed, any attempt to draw straightforward conclusions about the relationship between the rule of law and these aims will inevitably be frustrated by the fact that there exist a number of very different understandings of what conformity to the rule of law consists in. In this paper, I draw attention to the distinction between competing "thin" and "thick" conceptions of the rule of law. Understandably, the thin conception's relevance for advancing development aims has often been overlooked in favor of the thick conception's. Nevertheless, I offer here a decision-theoretic analysis of the thin conception's relationship to growth, compliance, and respect for dignity that justifies special focus on its significance for these areas. Specifically, I argue that, all things being equal, members of a state which violates the thin conception will have less incentive to engage in pro-growth conduct and/or more incentive to engage in anti-growth conduct, less incentive to comply with the law and/or more incentive to not comply, and will have less incentive to perform actions that will yield them greater utility and/or more incentive to perform actions that will yield them lower utility. In turn, this analysis predicts a negative relationship between violations of the thin conception and economic growth, legal compliance, and the amount of utility members of the state's decisions will yield them.

1 Introduction

The rule of law is frequently claimed to be an important factor – if not a necessary element – for advancing international development. Perhaps the

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most pressing development goals the rule of law is thought to promote are economic growth, legal compliance, and respect for human dignity. In particular, it is often asserted that insofar as the officials of a state conform to the rule of law, that state will typically be more likely to enjoy a growing economy and compliance with its laws, as well as will treat its members with a greater degree of respect. For instance, we see each of these three claims reflected in the Bingham Centre for the Rule of Law's mission statement, which describes the rule of law as a "universal and practical concept that upholds respect for human dignity and enhances economic development and political stability."[1] Given these claims, it is no surprise that the United Nations Development Programme has identified promotion of the rule of law as one of the prime goals of the post-2015 development agenda.[2] Meanwhile, it is also no surprise that in recent years there has been a growing body of research dedicated to examining the rule of law's importance for growth, compliance, and dignity.[3] And that research ranges from highly supportive to highly critical of the rule of law's importance for these goals.

Yet as many commentators have observed, any attempt to draw straightforward conclusions about the rule of law's significance will inevitably be frustrated by the fact that there exist a number of very different understandings of what conformity to the rule of law consists in.[4] This fact accords with Jeremy

1 Bingham Centre for the Rule of Law, Mission Statement, available at: <http://binghamcentre.biicl.org/mission-statement>, accessed 24 August 2015.

2 See United Nations Development Programme, Issue Brief – Rule of Law and the Post-2015 Development Agenda, available at <https://www.worldwewant2015.org/es/file/341332/download/371036>, accessed 24 August 2015.

3 With regards to the rule of law's relationship to economic growth, see, *e.g.*, Kenneth Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press, 2006); Stephen Haggard and Lydia Tiede, *The Rule of Law and Economic Growth: Where are We?*, 39 World Development, no. 5 (2011), 673–685; Ding Chen and Simon Deakin, *On Heaven's Lathe: State, Rule of Law, and Economic Development*, 8 Law and Development Review, no. 1 (2015), 123–145. With regards to the rule of law's relationship to legal compliance, see, *e.g.*, Tom Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime and Justice (2003), 283–357; Nigel Simmonds. *Straightforwardly False: The Collapse of Kramer's Positivism*, 63 Cambridge Law Journal, no. 1 (2004), 98–131; Marcelo Bergman, *Tax Evasion and the Rule of Law in Latin America: The Political Culture of Cheating and Compliance in Argentina and Chile* (Pennsylvania State University Press, 2009). With regards to the rule of law's relationship to respect for human dignity, see, e.g., Matthew Kramer, *Objectivity and the Rule of Law* (Oxford University Press, 2007); Jeremy Waldron, *How Law Protects Dignity*, 71 Cambridge Law Journal, no. 1 (2012), 200–222; T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford: Oxford University Press, 2013).

4 See Stephen Haggard, Andrew MacIntyre and Lydia Tiede, *The Rule of Law and Economic Development*, 11 Annual Review of Political Science (2008), 205–234; Rachel Belton, *Competing*

Waldron's widely accepted claim that the rule of law is an *essentially contested concept*.[5] The notion of an essentially contested concept was originally introduced by philosopher W.B. Gallie in order to explain the seeming impossibility of assigning uncontroversial definitions to terms like "democracy," "social justice," and "art."[6]

As Waldron notes, what these concepts share with the rule of law is their *normativity* and *internal complexity*.[7] On the one hand, to describe a country as democratic or one which conforms to the rule of law characteristically carries with it a positive connotation – the usual implication being that that state thereby exhibits some feature taken to be desirable by the speaker. On the other, even where we all agree that some state is or is not democratic or does or does not conform to the rule of law, that conclusion reflects a confluence of factors, permitting multiple reasonable yet deeply inconsistent views on which factors must be present and how they support that conclusion. Thus although in an important sense we all share *the concept* of the rule of law, we can differ dramatically in our particular *conceptions* of what it consists in.[8]

For purposes of this article, we will confine our attention to just two opposing conceptions of the rule of law. First, let us define as the "thin conception" of the rule of law a conception on which the rule of law's central requirement is that the officials of a state only impose sanctions (e.g., imprisonment or tort damages) and confer benefits (e.g., enforce contracts or provide social assistance) on its members pursuant to rules rather than *ad hoc* discretion.[9] Given

Definitions of the Rule of Law: Implications for Practitioners, *Carnegie Papers, Rule of Law Series* (2005) (Carnegie Endowment for International Peace, 2005), available at: <http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf>, accessed 24 August 2014; Jørgen Møller and Svend-Erik Skaaning, *The Rule of Law: Definitions, Measures, Patterns and Causes* (Palgrave Macmillan, 2014), ch. 1.

5 See Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 Law and Philosophy, no. 2 (2002), 137–164; see also Margaret Radin, *Reconsidering the Rule of Law*, 69 Boston University Law Review, no. 4 (1989), 781–819; Richard Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Columbia Law Review, no. 1 (1997), 1–56; Møller and Skaaning (2014), *supra* note 4, p. 7.

6 See W.B. Gallie, *Essentially Contested Concepts*, 56 Proceedings of the Aristotelian Society (1956), 167–198.

7 See Waldron (2002), *supra* note 5, p. 150.

8 See *id.*, pp. 150–151.

9 See Lon Fuller, *The Morality of Law* (Rev. ed., New Haven, CT: Yale University Press. 1969), 39. It would be more precise to speak of a family of thin conceptions. But because the crucial distinction for purposes of this article is not between thin conceptions but between thin conceptions and thick conceptions, for ease of expression I will refer to the thin conception in the singular throughout.

that the thin conception so-defined primarily constrains the *form* by which a state is to be governed (i.e. via rules), it loosely corresponds to what people often have in mind when they refer to "formal" conceptions of the rule of law.[10] A few noteworthy proponents of the thin conception so-defined include Waldron,[11] Lon Fuller,[12] and Joseph Raz.[13]

By contrast, let us define as the "thick conception" a conception on which the rule of law's central requirement is that the officials of a state only impose sanctions and confer benefits on its members according to good and/or just criteria (e.g., those consistent with its members' human rights and/or their property rights, insofar as the latter are distinguished from the former), criteria deriving from good and/or just sources (e.g., democratically enacted legislative bodies), or both.[14] A few noteworthy proponents of the thick conception

10 See, *e.g.*, Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 21 Public Law (1997), 467–487; Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004), ch. 7; Møller and Skaaning (2014), *supra* note. 4, p. 1. The "thin" conception as a define it corresponds to what Brian Tamanaha labels "formal legality". See Tamanaha (2004), *supra* note 10, ch. 7. But for a criticism of characterizing conceptions of the rule of law as "formal" or "substantive", see John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012), ch. 8. In light of Gardner's observations, I eschew those labels here. An additional reason for eschewing this label is that in the context of development research, references to "formal" (or sometimes, "formal*ist*") conceptions of the rule of law often instead correspond to a distinction between *formal* and *informal* institutions. See, *e.g.*, Frank Upham, *Mythmaking in the Rule of Law Orthodoxy*, Carnegie Papers (Carnegie Endowment for International Peace, 2005), available at:<http://carnegieendowment.org/files/wp30.pdf>, accessed 24 August 2015; Yong-Shik Lee, *Call for a New Analytical Model of Law and Development*, 8 Law and Development Review, no. 1 (2015), 1–67; and Chen and Deakin (2015), *supra* note 3. The distinction between formal and informal institutions does not map directly onto the distinction between thin and thick conceptions. However, the thin conception as I define it here seems compatible with informal institutions, provided, of course, that those institutions do not result in state officials imposing sanctions and conferring benefits according to discretion rather than rules.

11 See Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012), ch. 2.

12 See Fuller (1969), *supra* note 9.

13 See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd ed., Oxford: Oxford University Press, 2009), ch. 11.

14 In defining the thick conception as such, I depart from the definitions proposed by Brian Tamanaha and Jørgen Møller and Svend-Erik Skaaning. Cf. Tamanaha (2004), *supra* note 10, at ch. 8; Møller and Skaaning (2014), *supra* note 4, at ch. 1. Specifically, my definition of the thick conception does not necessarily incorporate the thin conception: a proponent of the thick conception could hold that legal officials may impose sanctions and confer benefits according to discretion rather than rules. Ronald Dworkin presents one such example.

so-defined include Ronald Dworkin,[15] Richard Epstein,[16] and Amartya Sen.[17] Given that the thin conception so-defined primarily constrains the *substance* of the criteria by which a state is to be governed, it loosely corresponds to what people often have in mind when they speak of "substantive" conceptions of the rule of law.[18] Roughly put, the difference between the thin conception and the thick conception amounts to the difference between *rule governance* on the one hand and *good* and/or *just governance* on the other.

The thin conception's relevance for advancing development aims has often been overlooked in favor of the thick conception's. Consider here Brian Tamanaha's observation that "[i]n the development context, the rule of law is usually identified with property rights, contract enforcement, low crime rates, minimal corruption, independent judiciaries, legal formalism, and legal limits on government officials, while broader versions include democracy, human rights, and welfare rights."[19] None of these items can be unambiguously identified with the ideal of rule governance,[20] and most of them clearly fall under the thick conception. The ones which come closest to reflecting the thin conception are minimal corruption, independent judiciaries, and legal limits on government officials, but even these do not quite hit the mark. Corruption and the lack of an independent judiciary are both certainly highly worrisome from the perspective of the thin conception, but the worry they pose is by no means confined to the threat they pose for rule governance. Indeed, they are also often opposed on the grounds that they increase the chances state officials will exercise their discretion in bad and/or unjust ways. Legal limits on officials obviously comes the closest, but it is one thing to think the rule of law requires that official discretion be constrained, and quite another to insist that the existence of official discretion itself marks a departure from the rule of law.[21]

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15 See Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985).

16 See Richard Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Harvard University Press, 2012). Epstein presents a somewhat unique case in that he believes the thin conception is in fact correct as a purely conceptual matter, yet insists that protection of private property and personal liberty are necessary if adherence to the rule of law is to be realized in practice. See *id*. pp. 10–12. For further discussion of this point, see Waldron (2012), *supra* note 11, pp. 19–20.

17 See Amartya Sen, "Global Justice", in James Heckman, Robert Nelson and Lee Cabatingan (eds.), *Global Perspectives on the Rule of Law* (Routledge, 2010), pp. 55–70.

18 But see *infra*, *supra* note 10.

19 Brian Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 Cornell International Law Journal, no. 2 (2011).

20 Regarding legal formalism, see *supra* note 10.

21 Cf. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978), ch. 2.

To be sure, there are a number of very reasonable explanations for why research has focused more on the thick conception's relevance to development aims than the thin conception's. For one, the influence of American Legal Realism and Critical Legal Studies has led many to take a highly skeptical stance towards the very existence of legal rules.[22] And even those who have gone so far as to claim that conformity to the thin conception is a *necessary* condition for economic growth, legal compliance, and state respect for human dignity have readily admitted that even perfect conformity to it will not suffice to fulfill these aims.[23]

Moreover, the criteria imposed by the thick conception seem to have very strong intuitive connections to growth, compliance, and dignity. For example, insofar as contractual freedoms, private property rights, and the like are thought to be required by the rule of law, it is natural to think that individuals will have greater incentives to acquire, develop, and exchange goods and services. Likewise, insofar as a state is to be governed according to democratic institutions and in accord with its members' human rights (including, perhaps, their private property rights), it is natural to think that its members will be more likely to believe the state possesses legitimate authority, and thus will be more likely to comply with its laws. Finally, it is obvious that a state will only fully respect its members' dignity if some or all of these conditions are met.

Nevertheless, it is crucial to recognize that claims about the rule of law's importance for growth, compliance, and dignity have often been made with only the thin conception in mind.[24] The purpose of this article is to show how decision theory lends support to such claims. In the next section, I defend focusing on the thin conception's unique significance for international development given its commonly accepted justification among contemporary legal philosophers as a means of advancing the reliable guidance of action. Given this understanding of the thin conception's importance, I then identify two distinct ways it can be violated and their concomitant effects on rational decision-making. Section 3 formalizes these effects in decision-theoretic terms, and Section 4 examines their most salient implications for economic growth, legal compliance, and respect for dignity. Section 5 concludes by addressing some limitations with the thin conception and the analysis offered here.

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22 See, e.g., Fallon (1997), *supra* note 5, pp. 16–17; Craig (1997), *supra* note 10, pp. 474–477; Tamanaha (2004), *supra* note 10, ch. 6.

23 See, *e.g.*, Fuller (1969), *supra* note 9, pp. 184–185; Raz (2009), *supra* note 13, pp. 226–228; Hayek (2011), *The Constitution of Liberty* (Def. ed., Chicago: University of Chicago Press, 2011), 331–332.

24 See *id*.

2 The thin conception

2.1 Fitting the rule of law

In order to demonstrate that a decision-theoretic analysis of the thin conception can help us understand the relationship between the rule of law and development, it is necessary to first establish that the thin conception is indeed a valid account *of* the rule of law. But before we can do that, we must get clear on what follows from the fact that the rule of law is an essentially contested concept.

To be sure, from one perspective both of these questions might seem superfluous. One could of course simply stipulate a definition of the rule of law and investigate it without worrying too much about how that definition lines up with other uses of the term. But research on the rule of law's role in promoting growth, compliance, and respect for dignity often does not proceed in this fashion. Instead, it is typically motivated in large part by popular and historical claims about the rule of law's significance, however disputed the content of that concept might be, and however much it may need to be modified to be made suitable for clear and rigorous analysis. This as much is reflected in the attention often paid to the genealogy of the notion and how it is understood in non-technical settings.[25] And that makes sense insofar as academic interest in the rule of law does not exist in a vacuum. Though the relationships revealed between merely stipulative definitions of the rule of law and development would undoubtedly be both true and important, they would inevitably fail to speak to the full range of considerations motivating interest in the rule of law.

To appreciate the implications of the rule of law's essentially contested character, a natural point of departure is with the work of Ronald Dworkin. Not only has Dworkin's argument for the thick conception received more discussion than perhaps anyone else's,[26] close attention to the nature of essentially contested concepts and their applications in legal contexts was a constant theme throughout the entirety of his career.[27] Thus although Dworkin's critique of the

25 Cf., *e.g.*, Dam (2006), *supra* note 3, ch. 1; Haggard and Tiede (2011), *supra* note 3, pp. 674–676; Møller and Skaaning (2014), *supra* note 4, ch. 1.

26 See, *e.g.*, Radin (1989), *supra* note 5, *passim*; Craig (1997), *supra* note 10, pp. 477–479; Tamanaha (2004), *supra* note 10, ch. 8.

27 See Dworkin (1978), *supra* note 21, ch. 4. In later works, Dworkin preferred to use the phrase "interpretive concept" instead. See, e.g., Dworkin, *Laws's Empire* (Harvard University Press, 1986); Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011). However, elsewhere Dworkin used the phrases interchangeably. See Dworkin, *Justice in Robes* (Harvard University Press, 2006), p. 221.

thin conception is obviously not the only one worthy of discussion,[28] it deserves special attention.

According to Dworkin, it follows from the fact that a concept is essentially contested that accurately understanding it requires us to examine both how it is actually applied and the reasons which make it an attractive ideal.[29] In Dworkin's terminology, we reach the correct account of an essentially contested concept – in our case, the rule of law – when our account both *fits* and *justifies* its usage. First, because we are attempting to interpret an existing concept rather than merely stipulating a definition, our definition must strive to be as consistent as possible with the way that concept is in fact used. But because essentially contested concepts are characterized by their inherent normativity, our definition should also strive to reflect our best judgment of what makes that concept important. In particular, Dworkin claimed that the correct interpretation of an essentially contested concept is the one which strikes the *equilibrium* between the constraints of fit and justification. His preferred analogy was to liken the process of interpreting an essentially contested concept to solving a pair of simultaneous equations. We find the correct interpretation of the concept at hand when we cannot better fit its usage without losses in justification, and cannot better justify it without losses in fit.

Given that the rule of law is an essentially contested concept, then, the first question we must ask of any definition of it is how well that definition coheres with common beliefs about when the rule of law obtains. And even the most cursory review of how people apply (and have applied) the concept of the rule of law demonstrates that the distinction between rules and discretion has always been one of the central ideas associated with it. This as much is clear just by looking at the history of the very phrase "the rule of law." For A.V. Dicey, who is generally credited with popularizing that phrase,[30] himself presupposed only the thin conception.[31] As he put it, "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or *discretionary* powers of constraint."[32]

Moreover, though the English phrase "the rule of law" became popular only in the last few hundred years, the claim that a state ought to be governed

28 For some other noteworthy defenses of the thick conception, see, e.g., Evan Fox-Decent, *Is the Rule of Law Really Indifferent to Human Rights?*, 27 Law and Philosophy, no. 6 (2008), 533–581; Epstein (2012), *supra* note 16, ch. 4; Allan (2013), *supra* note 3, ch. 3.

29 See Dworkin (1986), *supra* note 27, pp. 45–86.

30 See, e.g., Tom Bingham, *The Rule of Law* (Penguin Books, 2011), ch. 1.

31 See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982); see also Craig (1997), *supra* note 10, pp. 470–474.

32 See Dicey (1982), *supra* note 31, p. 110 (emphasis added).

according to rules rather than the discretion of its officials can be found at least as far back in history as with the Ancient Greeks.[33] For example, Plato warned that "[w]here the law is itself ruled over and lacks sovereign authority, I see destruction at hand for such a place," whereas he insisted that "where it is despot over the rulers and the rulers are slaves of the law, there I foresee safety and all the good things which the gods have given to cities."[34] Meanwhile, we find it in the work of Enlightenment thinkers like John Locke, who identified law with "standing Rules" and tyranny with official "Will."[35]

Finally, the identification of the rule of law with rule governance as opposed to official discretion is of course familiar from contemporary appeals to the rule of law. Consider, for instance, the association of the rule of law with the principle of legality in criminal law.[36] And above all else we see it in the omnipresent yet regrettably sexist contrast drawn between "the rule of law" and "the rule of men."

2.2 Justifying rule governance

By Dworkin's logic, our definition of the rule of law must account for how prominently that concept is associated with the idea that a state should be governed by rules. But of course this is only one half of the equation. The other half is the question of what *justifies* the importance of the rule of law. In the end, we might need to modify or perhaps even abandon the identification of the rule of law with rule governance if another conception is available which will better balance the demands of fit and justification.

And there is no doubt that although the concept of the rule of law has always been prominently associated with the idea that the state should be governed according to rules rather than discretion, the rule of law's justification has always been a moving target.[37] For Plato, the fundamental reason rules are to be preferred over discretion is two-fold: we cannot plausibly expect any person or group to both know how to appropriately govern a community and

33 See Tamanaha (2004), *supra* note 10, pp. 7–10.

34 See Plato, *Laws* (University of Chicago Press, 1980), pp. 102.

35 See John Locke, *Two Treatises of Government* (Student ed., Cambridge, UK: Cambridge University Press, 1988), pp. 318–330, 398–405.

36 See Kenneth Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2010), ch. 1.

37 See Waldron (2002), *supra* note 5, pp. 140–144.

simultaneously resist the temptations inherent in the exercise of discretion.[38] By instead constraining political power via standing rules, a community will have the best prospects for long-term survival. Meanwhile, for Locke rules are to be preferred over discretion because the latter is incompatible with a society of free equals.[39] Insofar as a state official wields discretionary power, Locke argued, members of the state are thereby made less free than him or her, as they are to that degree subject to the control of his or her will.[40]

Dworkin's own view was that justifying an essentially contested concept requires us to solve an additional set of simultaneous equations.[41] On the one hand, our interpretation must cohere with all our other values. That is, our concept of the rule of law must be consistent with our concept of human rights, which must be consistent with our concept of democracy, which must be consistent with our concept of property, and so forth. On the other, it must cohere with our independent moral and ethical convictions.[42] The way to accomplish this, Dworkin further claimed, is by defining our values in reference to each other. Thus our definition of rule of law must partially incorporate our definition of human rights, and our definition of human rights must partially incorporate our definition of the rule of law, and so forth.

Perhaps Dworkin was correct on this issue. Maybe it is the case that the rule of law cannot be defined in wholly descriptive terms, but must also call for some degree of evaluation. And maybe also the way to do this is by defining it by reference to other ideals. If so, then there may very well always be some gap between our understanding of the thin conception's role in development and the *rule of law*'s role in development. And if Dworkin was correct, the thin conception obviously cannot be the correct account of the rule of law, as conflicts between the thin conception and human rights, democracy, and the institution of private property are always possible. For it is at least a theoretical possibility that a state might perfectly conform to the thin conception and yet violate human rights, be undemocratic, and fail to protect personal property.

Nevertheless, there are reasons to resist Dworkin's proposal, at least in the specific context of investigating the rule of law's role in development. For one,

38 See Plato (1980), *supra* note 34; see also V. Bradley Lewis, *Higher Law and the Rule of Law: The Platonic Origin of an Ideal*, 36 Pepperdine Law Review, no. 5 (2012), 631–660.

39 See Locke (1988), *supra* note 35.

40 See *id*., pp. 305–306; see also Christopher D. Boom, "Reflections on the Rule of Law After NFIB v. Sebelius", in Fritz Alhoff and Mark Hall (eds.), *The Affordable Care Act Decision: Philosophical and Legal Implications* (Routledge, 2014), pp. 283–297, at 288.

41 See Dworkin (2011), *supra* note 27, pp. 262–264.

42 Here I follow Dworkin's preferred nomenclature in distinguishing between "ethics" and "morality." Cf *id*., pp. 13–15. However, elsewhere in this article I ignore that distinction.

Dworkin's proposal necessarily precludes the existence of any set of factual metrics by which we can appropriately measure state conformity with the rule of law.[43] This is because if the definition of the rule of law must itself incorporate the definition of human rights, democracy, and the like, the concept of the rule of law is not "value-free" in the sense that we will not be able to truly assess a state's conformity to the rule of law without also in part engaging in a determination of whether that state respects human rights, is democratic, protects private property, and so forth.[44] And those determinations, in turn, will not be value-free either, in that to truly assess a state's conformity with human rights on Dworkin's account, we must ask whether the state's actions can be reasonably defended as an attempt to respect the dignity of it members.[45] To determine if it is democratic, we must ask whether its members treat each other as full partners in the governance of the state.[46] And to assess its conformity with property rights we must ask what rightfully belongs to people.[47] As such, we face a fundamental obstacle to the very possibility of measuring rule of law conformity. Although we can say certainly *something* important about rule of law conformity by reference to empirical indicators (e.g., Dworkin maintained that state actions departing from worldwide consensus about basic human rights cannot be reasonably defended as attempts to respect dignity), in the end whether or not a state conforms to the rule of law will not be something we can determine descriptively. Instead, we must necessarily engage in normative inquiry as well.

Meanwhile, whereas the thin conception is no doubt lacking in the way of full justifiability, it has the merit of being practicable, at least in principle, for the purpose of empirical measurement. This is because whether or not state officials conform to rules rather than exercise discretion is fundamentally a question of *social fact*, not evaluation.

Moreover, there is widespread agreement about the central justification of the thin conception, at least within contemporary philosophy of law.[48]

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43 Cf. Ian Carter, "Value-freeness and Value-neutrality in the Analysis of Political Concepts," in David Sobel, Peter Vallentyne, and Steven Wall (eds.), *Oxford Studies in Political Philosophy*, *Vol. 1* (Oxford University Press, 2015), 279–304.

44 According to Ian Carter's definition, a concept is value-free "if its definition is such that the *definiens* contains no evaluative terms." See *id*., p. 284.

45 See Dworkin (2011), *supra* note 27, pp. 335–336.

46 See *id*., p. 384.

47 See *id*., pp. 375.

48 See, *e.g.*, Fuller (1969), *supra* note 9; Hayek (2011), *supra* note 23, ch. 14; Raz (2009), *supra* note 13, ch. 11; John Finnis, *Natural Law and Natural Rights* (2nd ed., New York, NY: Oxford University Press, 2011); and Waldron (2012), *supra* note 3, pp. 51–65. But for a noteworthy exception, see Paul Gowder, *The Rule of Law and Equality*, 32 Law and Philosophy, no. 5 (2013),

Specifically, most contemporary legal philosophers maintain that the fundamental importance of the thin conception is that a state's members will be better able to plan their lives in relation to the prospects of state action where state officials only impose sanctions and confer benefits on them according to rules rather than discretion. Insofar as a state's officials only impose sanctions and confer benefits on its members according to rules, its members can possess reliable guidance as to which of their actions will or will not trigger state sanctions and benefits, and thereby plan their affairs accordingly. Consider here Friedrich Hayek's comparison of the member of the state's knowledge of the law where officials conform to the thin conception to his knowledge of the laws of the natural world:

> The effects of ... man- made laws on his actions are of precisely the same kind as those of the laws of nature: his knowledge of either enables him to foresee what will be the consequences of his actions, and it helps him to make plans with confidence. There is little difference between the knowledge that if he builds a bonfire on the floor of his living room his house will burn down, and the knowledge that if he sets his neighbor's house on fire he will find himself in jail.[49]

By contrast, insofar as a state's officials impose sanctions and confer benefits on its members according to discretion, its members will to that extent necessarily lack reliable guidance as to which of their actions will or will not trigger state sanctions or benefits. In a phrase, then, the justification of the thin conception according to most contemporary legal philosophers owes to its importance for *action guidance*.

Dworkin denied that a concern for action guidance is the appropriate justification for the rule of law. In fact, he was typically highly dismissive of this line of thought.[50] Instead, he claimed that the justification of the rule of law rests on the importance of enforcing people's moral rights.[51] The reason why

565–618. Note, however, that my claim here is not that contemporary advocates of the thin conception in philosophy of law never appeal to other justifications of the rule of law. For example, in addition to justifying it in terms of action guidance, Hayek also justifies it (like Locke) via a concern or will independence. See Boom (2014), *supra* note 40, p. 288. My claim is instead just that action guidance forms the central or primary justification of the rule of law among these authors. Furthermore, they do not always share the same views on its significance at a deeper level. For instance, Raz and Fuller identify the deeper significance of the thin conception ultimately with respect for human dignity, whereas Hayek focused instead just on its significance for individual freedom. Compare Fuller (1969), *supra* note 9, p. 162, and Raz (2009), *supra* note 13, pp. 221–222, with Hayek (2011), *supra* note 23, ch. 14.

49 See Hayek (2011), *supra* note 23, p. 221.

50 See Dworkin (1985), *supra* note 15, p. 16; see also Dworkin (1986), *supra* note 27, pp. 140–150; *Id*., *The Rule of Law*, Law of Ukraine: Legal Journal, no. 4 (2013), 7–13.

51 See Dworkin (2006), *supra* note 27, pp. 11–12.

officials should generally conform to the rules, he argued, is due to considerations of democratic legitimacy: where a representative legislative body enacts a rule, people have a *prima facie* moral right that officials enforce it.[52] And Dworkin insisted that people are not entitled to action guidance as such.[53] According to him, a state's officials act wrongfully in failing to reliably guide its members' actions only where they deliberately encourage expectations and then deliberately frustrate them.[54]

Dworkin's case for preferring the thick conception over the thin conception deserves careful scrutiny. Most importantly, it is doubtful whether he ever gave serious enough consideration to the arguments, reviewed in Section 4.4, purporting to establish a necessary connection between action guidance and state respect for human dignity. And given the importance of the criterion of fit to Dworkin's theory of essentially contested concepts, even if those arguments ultimately fail, it remains doubtful that this is a sufficient basis for putting aside the pervasiveness of the idea that the rule of law is incompatible with discretion *per se*, and not just with discretion inconsistent with democratically enacted rules or deliberately created expectations. But if nothing else, the thin conception's clear implications for rational decision-making, and, by extension, for decisions implicated in economic growth, legal compliance, and respect for human dignity marks it out as unique vantage point for better understanding the rule of law's role in advancing these goals.

2.3 Two ways of violating the thin conception

At this point, let us turn to more precisely specify the criteria that the thin conception imposes and their importance for action guidance. In particular, following Raz we can identify at least two ways the rule of law can be violated and their distinctive effects on decision-making.[55] The first of these ways is

52 See *id*., p. 16.

53 Cf. Dworkin (1986), *supra* note 27, pp. 140–142.

54 See *id*., pp. 141–142.

55 See Raz (2009), *supra* note 13, p. 222. There are other ways of violating the thin conception besides these two. For example, neither of the types of rule of law violations seem to adequately capture violations involving secret rules, or rules which subjects are incapable of complying with, despite Raz's statement the rule of law requires that the laws "must be such that they can find out what it is and act on it." Compare *id*. p. 214 with *id*. p. 222. Nor does it seem to adequately capture the violation which occurs where rules contradict each other. See Fuller (1969), *supra* note 9, p. 65–70. But I leave analysis of these additional types of violations for another occasion.

obvious from the very definition of the thin conception: the thin conception is violated insofar as a state's officials impose sanctions or confer benefits on its members according to discretion rather than rules.[56] (Call this a "Type 1 Violation".) And as we saw above, from the perspective of action guidance the fundamental problem with officials imposing sanctions and conferring benefits according to discretion rather than rules is that the state's members will thereby be less able to predict which of their choices will or will not result in state sanctions or benefits. As Raz puts it, the effect of discretion is thus *uncertainty* among a state's members regarding the circumstances under which sanctions will be imposed and benefits will be conferred.[57] (Call this the "Uncertainty Effect" of Type 1 Violations.)

Yet, crucially, it does not suffice merely that a state's officials impose sanctions or confer benefits according to rules for those rules to reliably guide its members' actions. Among other things,[58] rules will fail to be reliably action guiding if, despite its members reliance on those rules, the state does not actually apply them, or does not apply them consistently with actors' beliefs about their content.[59] (Call this a "Type 2 Violation".) Consider here circumstances in which the officials of a state deviate from the rules due to reasons of corruption or bias, as well as circumstances in which they engage in retroactive rule-making or produce novel interpretations of the law unforeseen by the state's members. Instead of resulting in uncertainty, where a state's members rely on their beliefs about the content of the rules in forming beliefs about whether their actions will trigger state sanctions or benefits, Type 2 Violations will instead have the effect of *frustrating expectations*. (Call this the "Frustrated Expectations Effect" of Type 2 Violations). Type 2 Violations are thus also incompatible with action guidance. But unlike Type 1 Violations, this is not because under such circumstances a state's members will be uncertain in their predictions, but rather because they will be *overly* certain in them.

By contrast, holding all other factors constant, the Uncertainty and Frustrated Expectations Effects are avoided if conformity to the thin conception of the rule of law obtains. (Call this "Thin Conception Conformity".) *Ceteris paribus*, where Thin Conception Conformity obtains, the members of a state can be certain which of their actions will or will not result in state sanctions or benefits, and those expectations will not be frustrated by officials.

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56 See *id*., p. 222.
57 See *id*.
58 See *supra* note 55.
59 See Raz (2009), *supra* note 13, p. 222.

3 Decision-theoretic implications of thin conception violations

3.1 Key concepts

In this section, we will see how the Uncertainty and Frustrated Expectation Effects can be formalized in decision-theoretic terms. But first allow me to briefly review some of the key ideas I will appeal to in my analysis.

Begin with the idea that the rationality of some decision[60] depends (at least in part) on whether that decision will result in a set of outcomes that the actor prefers,[61] or whether some competing decision[62] will instead produce that set, or whether both those decisions will do so. Where an actor prefers the occurrence of one set of outcomes[63] over a different set of outcomes,[64] we say that the *utility* for the actor of the former set of outcomes[65] is greater than the utility of the latter set of outcomes.[66]

In turn, the utilities of the decisions available to the actor will (partially) depend on which, or both, of those decisions will result in the preferred set of outcomes versus the non-preferred set of outcomes. Supposing that one decision will result in the actor's preferred set of outcomes, and a competing decision will result in the non-preferred set, then, all things being equal, the utility of the former decision[67] will be greater than the utility of the latter.[68] And thus, all things being equal, the former decision rather than the latter will be the actor's rational decision. By contrast, if the latter decision would bring about the preferred set of outcomes and the former would bring about the non-preferred set then, *ceteris paribus,* the latter decision would be the actor's rational decision. Meanwhile, if both decisions would result in the same set of outcomes,

60 Call this "d".

61 Of course, people can – and often do – prefer to make (or not make) certain decisions for reasons independent of the outcomes of those decisions. The most salient such cases are where they regard a certain decision as intrinsically wrong or right independent of the outcomes it produces. However, I will put such considerations to the side for purposes of this article.

62 Call this "$\neg d$".

63 Call this "O".

64 Call this "$\neg O$".

65 $U(O)$.

66 $U(O) > U(\neg O)$.

67 $U(d)$.

68 $U(d) > U(\neg d)$.

then, *cet. par.*, both would yield equal utility and both would be equally rational.

To illustrate, suppose that the first decision available to the actor is to drive on the right hand side of the road, and the second is the decision to drive on the left hand side of the road. Suppose also that the set of outcomes which includes *not* getting in a collision is preferred by the actor over the set of outcomes which includes getting in a collision. If we are to further assume that the only preference at issue is the actor's preference to avoid getting in a collision, then the rationality of driving on the right hand side of the road versus the left hand side of the road depends solely on which of those decisions (or both, or neither) will result in the actor getting into a collision.

But notice that this model of pure rational choice is far too simplistic for most real-world scenarios. This is because it does not take into account the fact that the causal relationship between decisions and their outcomes is often not deterministic, but probabilistic. To return to our automobile example, in actuality there is of course always *some* chance that one will get in a collision regardless of which side of the road one chooses to drives on.

To that end, we need to take into account the *conditional probability* that a decision will result in a given set of outcomes. Thus with regards to the simple model sketched above, we must also factor in the conditional probabilities that the actor's preferred set of outcomes will occur given some decision,[69] that the non-preferred set of outcomes will occur given that decision,[70] that a competing decision will result in the non-preferred set of outcomes,[71] and that a competing decision will result in the preferred set of outcomes.[72]

This leads us to draw a distinction between the *actual* utility of a decision and its *expected* utility.[73] Calculating the expected utility of a decision calls for us to sum the products of the utilities of the various outcomes it may bring about and the conditional probabilities that it will in fact bring them about.[74] We then compare the expected utilities of the decisions available to the actor. Assuming that an actor only has two decisions available and that one decision will yield

69 $P(d|O)$.
70 $P(d|\neg O)$.
71 $P(\neg d|\neg O)$.
72 $P(\neg d|O)$.
73 $EU(d)$.
74 $EU(d) = P(d|O)U(O) + [1 - P(d|\neg O)]U(\neg O)$. Notice here that, together, the probabilities of the various sets of outcomes a decision may produce must add up to 1 [i.e. 100%]. Therefore, if we only have two possible sets of outcomes, the probability that one set will occur must equal one minus the probability of the other. This is why the probability that $\neg O$ will occur given d equals 1-P, as P represents the probability that O will occur given d.

greater expected utility than the other, then the decision which will yield greater expected utility is the actor's rational choice. (And, as before, where the expected utilities of the decisions are equal, then those decisions are equally rational).

To these ideas, we need to add just a couple clarifications. First, note that there are two competing ways of thinking about probabilities. On the one hand, assessments of probability might be interpreted *subjectively*, as a function of one's *beliefs* about the chances some outcome will occur, or *objectively*, as a function of *the way the world is* independently of what we believe.[75] In this paper, we will interpret probability in the subjective sense, leaving aside the difficult philosophical question regarding which, if either, of these ways is a better understanding of the concept of probability as such.

Relatedly, note also that decision theory has been held out as both a *normative* theory of actors' choices and a *predictive* theory of those choices.[76] That is, decision theory is thought to tell us both what choices an actor *should* make, and what choices she *will* make. In what follows, we will be primarily concerned with the predictive applications of decision theory.[77]

3.2 Formalizing the uncertainty and frustrated expectations effects

Let us now consider the implications of thin conception violations within the framework set forth above. For now we can simplify matters by taking the actor's decision as given. Likewise, the only outcome we will be concerned with here is the occurrence of state action, putting aside for the moment whether the state action at hand consists in a sanction or a benefit to the actor. Instead, we will focus simply on the probability that state action will occur given an actor's decision,[78] the probability that state action will not occur given the actor's decision,[79] and whether or not state action will in fact occur given the probability that it will or will not occur.

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75 See Ian Hacking, *An Introduction to Probability and Inductive Logic* (Cambridge University Press, 2001), ch. 11–12.

76 Cf. Herbert Gintis, *The Bounds of Reason: Game Theory and the Unification of the Behavioral Sciences* (Princeton University Press, 2009), ch. 1.

77 But see the discussion of the thin conception's significance for respecting human dignity in my concluding remarks.

78 $P(d|a)$.

79 $P(d|\neg a)$.

Take Type 1 Violations first, which exist where officials impose sanctions or confer benefits according to discretion rather than rules. Recall that Type 1 Violations produce an Uncertainty Effect: actors cannot be certain whether their decisions will result in state action or not. Stated in terms of probabilities, then, we can say that where Type 1 Violations occur, the probability that state action will occur given a decision will necessarily *not* be either 0% or 100%, but will rather lie somewhere between 0% and 100%.[80]

By contrast, holding all other factors constant (e.g., the chances of detection, in the case of sanctions), where Thin Conception Conformity obtains, actors have perfect knowledge of whether a decision will result in state action depending on the rules pertaining to the imposition of state sanctions and conferring of state benefits. Thus, *ceteris paribus*, the probability that state action will occur given that decision *will* be either 0% or 100%.[81]

Now take Type 2 Violations, which exist where actors know the rules governing the conditions under which state sanctions will be imposed and state benefits conferred, but state officials disregard the rules or apply them inconsistently with actors' understanding of their content. Assuming that actors rely on their beliefs about the rules in forming their beliefs about the chance of state action, then, unlike Type 1 Violations but like Thin Conception Conformity, the probability that state action will occur given a decision will equal 0% or 100%.[82] Nevertheless, actors' reliance on their beliefs about the rules in the presence of a Type 2 Violation will give rise to the Frustrated Expectations Effect, where state action occurs or does not in opposition to the actor's beliefs. That is, where the probability of state action given a decision equals 0%, then state action *will* nevertheless occur if that decision is made,[83] and it will *not* occur where that probability equals 100%.[84] Meanwhile, *cet. par*, the opposite holds where Thin Conception Conformity obtains. Where the probability of state action given a decision equals 0%, then, *cet. par.*, state action will not occur if that

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80 Type 1 Violation
(1) $0 < P(d|a) < 1$

81 Thin Conception Conformity
(1) $P(d|a) = 0$ *or* 1

82 Type 2 Violation
(1) $P(d|a) = 0$ *or* 1

83 $P(d|a) = 0$ *and* $d \rightarrow a$

84 Type 2 Violation
(1) $P(d|a) = 0$ *or* 1
(2) $[(P(d|a) = 0)$ *and* $d \rightarrow a]$*or*$[(P(d|a) = 1)$ *and* $d \rightarrow \neg a]$

decision is made, and where the probability of state action given a decision equals 100%, state action will occur if that decision is made.[85]

4 Three applications: growth, compliance, and dignity

4.1 Overview

We have just seen how the Uncertainty and Frustrated Expectations Effects can be interpreted in decision-theoretic terms. The task of this section is to examine a few of the most salient implications of the above for the contexts of economic growth, legal compliance, and respect for human dignity. Specifically, I will argue that, all things being equal: (1) the expected utility of engaging in pro-growth conduct will be lower (and/or of anti-growth conduct higher) where Type 1 Violations occur with regard to relevant decisions than where Thin Conception Conformity obtains and pro-growth conduct is permitted and/or satisfies power-conferring rules and anti-growth conduct is not permitted and/or fails to satisfy power-conferring rules; (2) the expected utility of legal compliance will be lower and/or non-compliance higher where Type 2 Violations occur than where Thin Conception Conformity Obtains; and (3) members of the state will yield less utility from their decisions where Type 1 or Type 2 decisions occur than where Thin Conception Conformity Obtains.

4.2 Economic growth

> We shall see that the observation of the rule of law is a necessary, but not yet a sufficient, condition for the satisfactory working of a free economy. But the important point is that all coercive action of government must be unambiguously determined by a permanent legal framework which enables the individual to plan with a degree of confidence and which reduces human uncertainty as much as possible.
>
> Friedrich Hayek [86]

85 Thin Conception Conformity

(1) $P(d|a) = 0$ *or* 1

(2) $[(P(d|a) = 0)$ *and* $d \rightarrow \neg a] or [(P(d|a) = 1)$ *and* $d \rightarrow a]$

86 Hayek (2011), *supra* note 23, pp. 331–332.

To examine the relevance of the thin conception for economic growth, we need to now distinguish between the two types of state action a decision might result in. Whereas the quote above from Hayek was published before H.L.A. Hart's classic, *The Concept of Law*,[87] we should follow Hart here in noticing that rules can be divided into two very different types: *duty-imposing* rules and *power-conferring* ones.[88] Whereas coercive duty-imposing rules (e.g., the rules of criminal law and torts) classify actions as permitted or prohibited and sanction prohibited actions, power-conferring rules (e.g., the rules of trusts and wills) classify actions as satisfying or not satisfying the conditions for receiving the benefits of state action.[89]

Consider the significance of duty-imposing rules first. Recall that the Uncertainty Effect of Type 1 Violations implies that where a Type 1 Violation exists with regards to a given decision, the probability that that decision will lead to state action will necessarily lie somewhere between 0% and 100%. In the context of duty-imposing rules, a Type 1 Violation thus exists with regards to a decision where officials have discretion to determine whether or not that decision will result in sanctions. And thus under such circumstances, the Uncertainty Effect implies that the probability of sanctions will occur given a decision[90] will lie somewhere between 0% and 100%.[91]

By contrast, holding other factors constant, where there are no Type 1 Violations, the probability that state action will occur given a decision equals 0% or 100%. As it concerns sanctions, *cet. par.*, the probability that sanctions will occur given a decision will equal to 0% or 100%.[92] More precisely, *cet. par.*, the probability that sanctions will occur if that decision is classified as a permitted action will equal 0%,[93] whereas the probability that sanctions will occur if that decision is classified as prohibited will equal 100%.[94]

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87 H.L.A. Hart, *The Concept of Law* (2nd ed., Oxford: Oxford University Press, 1994).

88 See *id.*, pp. 26–49.

89 See *id.*; see also Scott Shapiro, *Legality* (Harvard University Press, 2011), ch. 3.

90 $P(d|Sanction)$

91 **Type 1 Violation**

(1) $0 < P(d|a) < 1$

(a) $0 < P(d|Sanction) < 1$

92 $P(d|Sanction) = 0$ *or* 1

93 $d \in Permitted \rightarrow P(d|Sanction) = 0$

94 **Thin Conception Conformity**

(1) $P(d|a) = 0$ *or* 1

(a) $P(d|Sanction) = 0$ *or* 1

(i) $d \in Permitted \rightarrow P(d|Sanction) = 0$

(ii) $d \in \neg Permitted \rightarrow P(d|Sanction) = 1$

We can directly draw two relevant conclusions from the above observations. The first of these is that, *cet. par.*, the probability of sanctions given a decision will be higher where a Type 1 Violation occurs than where a Thin Conception Conformity obtains and that decision is permitted.[95] This follows from the fact that the probability of sanctions given a decision will necessarily be greater than 0% in the presence of a Type 1 Violation, whereas, *cet. par.*, the probability of sanctions will equal 0% where that decision is permitted and Thin Conception Conformity obtains. Meanwhile, the second such conclusion is that, *cet. par.*, the probability of sanctions given a decision will be lower where Thin Conception Conformity obtains and that decision is prohibited. And this follows from the fact that the probability of sanctions given a decision will necessarily be less than 100% in the presence of a Type 1 Violation, whereas, *cet. par.*, the probability of sanctions will equal 100% where that decision is prohibited and Thin Conception Conformity obtains.

In turn, these two conclusions imply that, *cet. par*, the expected utility of a decision will be lower where Type 1 Violations occur than where that decision is permitted and Thin Conception Conformity obtains, whereas it will be higher where Type 1 Violations occur than where it is prohibited and no Type 1 Violations occur.[96] To see this, recall that the expected utility of a decision is calculated by multiplying the utilities of the various outcomes that the decision may result in by the probability that it will result in those outcomes, and then by summing those amounts.[97] And if we limit our interest solely to the occurrence of sanctions, notice that because, *cet. par.*, the probability of sanctions equals 0% where Thin Conception Conformity obtains and the decision at issue is permitted (and thus the probability of no sanctions will equal 100%),[98] the expected utility of the decision will simply equal the utility of not receiving a sanction.[99] Meanwhile, because, *cet. par.*, the probability of sanctions equals 100% where Thin Conception Conformity obtains and the decision at issue is permitted (and thus the probability of no sanctions will equal 0%), the expected

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95 $P(d|Sanction)$ *if* Type 1 Violation $> P(d|Sanction)$ *if* Thin Conception Conformity *and* $d \in Permitted$

96 I make the simplifying assumption here that a decision will not both be prohibited under a duty-imposing rule and a mandatory condition for receiving a benefit under a power-conferring rule. This arguably follows from the thin conception's requirement that rules not contradict each other. Cf. *supra* note 55.

97 $EU(d) = P(d|O)U(O) + [1 - P(d|\neg O)]U(\neg O)$. Given that our outcome of interest here is the occurrence of sanctions, this becomes:
$EU(d) = P(d|Sanction)U(Sanction) + [1 - P(d|\neg Sanction)]U(\neg Sanction)$.

98 This follows because if P(d|Sanction) equals 0, 1-P(d|¬Sanction) equals 1.

99 $EU(d)$ *if* Thin Conception Conformity *and* $d \in Permitted = U(\neg Sanction)$

utility of the decision will simply equal the utility of receiving a sanction.[100] By contrast, because the probability of a sanction will necessarily *not* be either 0% or 100% where a Type 1 Violation occurs, the expected utility of a decision where a Type 1 Violation occurs will *never* simply equal the utility of receiving or not receiving a sanction.[101]

Assuming that the only relevant preference at hand is the preference for no sanctions over sanctions, it thus follows that, all things being equal the expected utility of a decision will be higher where Thin Conception Conformity obtains and that decision is permitted than it will be in the presence of a Type 1 Violation.[102] And, all things being equal, the expected utility of a decision will be lower where Thin Conception Conformity obtains and that decision is prohibited than it will be in the presence of a Type 1 Violation.[103]

We can now apply the same reasoning to benefits, except rather than ask whether or not a decision is permitted under some duty-conferring rule, we ask whether or not it *satisfies* the conditions of some power-conferring rule.[104] And by the same reasoning as above, we can simplify our calculations of expected utility where Thin Conception Conformity obtains with regards to a decision to confer benefits (i.e. officials lack discretion to determine whether that decision will result in benefits or not) and that decision is classified as one which does or does not satisfy the conditions of a power-conferring rule. Specifically, confining our attention now just to the occurrence of benefits, if that decision is classified as satisfying a power-conferring rule, its expected utility will simply equal the utility of the benefit conferred under that rule;[105] meanwhile, if it is not

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100 $EU(d)$ *if* Thin Conception Conformity *and* $d \in \neg Permitted = U(Sanction)$

101 $EU(d)$ *if* Type 1 Violation $\neq U(Sanction)$ *or* $U(\neg Sanction)$

102 $EU(d)$ *if* Thin Conception Conformity *and* $d \in Permitted > EU(d)$ *if* Type 1 Violation

103 $EU(d)$ *if* Thin Conception Conformity *and* $d \in \neg Permitted < EU(d)$ *if* Type 1 Violation

104 **Type 1 Violation**

(1) $0 < P(d|a) < 1$

(a) $0 < P(d|Sanction) < 1$

(b) $0 < P(d|Benefit) < 1$

Thin Conception Conformity

(1) $P(d|a) = 0$ *or* 1

(a) $P(d|Sanction) = 0$ *or* 1

(i) $d \in Permitted \rightarrow P(d|Sanction) = 0$

(ii) $d \in \neg Permitted \rightarrow [P(d|Sanction) = 1$

(b) $P(d|Benefit) = 0$ *or* 1

(i) $d \in Satisfy \rightarrow P(d|Benefit) = 1$

(ii) $d \in \neg Satisfy \rightarrow P(d|Benefit) = 0$

105 $EU(d)$ *if* Thin Conception Conformity *and* $d \in Satisfy = U(Benefit)$

classified as satisfying a power-conferring rule, its expected utility will simply equal the utility of not receiving that benefit.[106] Yet, as before, because the probability of receiving a benefit will necessarily *not* be either 0% or 100% where a Type 1 Violation occurs, the expected utility of a decision where a Type 1 Violation occurs will never simply equal the utility of receiving or not receiving that benefit.

We are again in a position to compare the expected utility of a decision given Thin Conception Conformity versus Type 1 Violations. Except now, because we assume that actors prefer benefits to no benefits, the expected utility of that decision will be greater where it satisfies a power-conferring rule and Thin Conception Conformity obtains than where a Type 1 Violation occurs.[107] Meanwhile, the expected utility of a decision will be lower where it does not satisfy a power-conferring rule and Thin Conception Conformity obtains than where a Type 1 Violation occurs.[108]

From here, the relevance to economic growth becomes straightforward if we assume that under Thin Conception Conformity pro-growth conduct will be permitted by the duty-imposing rules and/or satisfy some power-conferring rule(s) whereas anti-growth conduct will not be permitted under the duty-imposing rules and will not satisfy any power-conferring rules. It is beyond the scope of the present article to identify what behaviors constitute pro-growth versus anti-growth conduct. Yet for illustration's sake, we might plausibly assume that investing, honoring business agreements, and developing natural resources are instances of the former, whereas embezzlement, breaching business agreements, and theft are instance of the latter. [109]

Extending our earlier analysis, because the probability of sanctions given pro-growth conduct will be 0% if Thin Conception Conformity obtains and it is permitted under duty-imposing rules, whereas it will necessarily be greater than 0% where a Type 1 Violation occurs (i.e. where officials have discretion to determine whether that conduct will result in sanctions), then holding all other factors constant, we can conclude that the expected utility of pro-growth conduct will be higher under the former circumstances than the latter.[110]

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106 $EU(d)$ *if* Thin Conception Conformity *and* $d \in \neg Satisfy = U(\neg Benefit)$

107 $EU(d)$ *if* Thin Conception Conformity *and* $d \in Satisfy > EU(d)$ *if* Type 1 Violation

108 $EU(d)$ *if* Thin Conception Conformity *and* $d \in \neg Satisfy < EU(d)$ *if* Type 1 Violation

109 Nevertheless, my argument here does not depend on the appropriate characterization of these examples; it just depends on there being *some* behaviors that are pro-growth and others which are anti-growth (if not in isolation, than at least within certain contexts), whatever those behaviors may be.

110 $EU(ProGrowth)$ *if* Thin Conception Conformity *and* $ProGrowth \in Permitted >$ $EU(ProGrowth)$ *if* Type 1 Violation

Likewise, because the probability of benefits will be 100% where Thin Conception Conformity obtains and pro-growth conduct satisfies some power-conferring rule(s), yet necessarily less than 100% where a Type 1 Violation occurs with regards to it (i.e. officials have discretion to determine whether or not it will result in benefits), then holding all other factors constant, we can conclude that the expected utility of pro-growth conduct will be higher under the former circumstances than the latter.[111] And because the expected utility of pro-growth conduct will be greater where Thin Conception Conformity obtains and that conduct is permitted under duty-imposing rules and/or satisfies some power-conferring rule(s) than in the presence of a Type 1 Violation, decision theory predicts that people will be more likely to engage in pro-growth conduct under the former circumstances than the latter.

By the same reasoning, we can conclude that the opposite holds with regards to anti-growth conduct. That is, the expected utility of anti-growth conduct will be lower where Thin Conception Conformity obtains and anti-growth conduct is prohibited under duty-imposing rules than in the presence of a Type 1 Violation,[112] as well as where Thin Conception Conformity obtains and it does not satisfy some power-conferring rule(s).[113] And given that the expected utility of anti-growth conduct will be lower where Thin Conception Conformity obtains and it is prohibited under duty-imposing rules and/or does not satisfy some power-conferring rule than it will be in the presence of a Type 1 Violation, decision theory predicts that people will be less likely to engage in anti-growth conduct under the former circumstances than the latter.

4.3 Legal compliance

> [I]f the citizen knew in advance that in dealing with him government would pay no attention to its own declared rules, he would have little incentive himself to abide by them.
> Lon Fuller[114]

Turn now to the thin conception's importance for legal compliance. In its widest sense, compliance might be thought to encompass not just duty-imposing rules,

111 $EU(ProGrowth)$ *if* Thin Conception Conformity *and* $ProGrowth \in Satisfy >$ $EU(ProGrowth)$ *if* Type 1 Violation

112 $EU(AntiGrowth)$ *if* Thin Conception Conformity *and* $AntiGrowth \in \neg Permitted <$ $EU(AntiGrowth)$ *if* Type 1 Violation.

113 $EU(AntiGrowth)$ *if* Thin Conception Conformity *and* $AntiGrowth \in \neg Satisfy <$ $EU(AntiGrowth)$ *if* Type 1 Violation.

114 Fuller (1969), *supra* note 9, p. 217.

but power-conferring ones as well. That is, we might say that members of a state comply with the law in part insofar as they take advantage of power-conferring rules that provide them with the ability to receive the benefit of state action (e.g., by creating enforceable wills or qualifying for social assistance programs). But for sake of simplicity I will focus here on the narrower understanding of legal compliance which is limited only to duty-imposing rules.[115] On this understanding, the issue of compliance is fundamentally one of *law and order*, asking simply whether a state's members obey its duty-imposing rules, not whether they also satisfy its power-conferring rules. My claim here is that Type 2 Violations reduce the expected utility of legal compliance so understood compared to Thin Conception Conformity.[116]

Recall from the previous subsection that where Thin Conception Conformity obtains, *cet. par.*, the probability a decision will result in sanctions equals 0% or 100%, depending on whether that decision is permitted or prohibited, respectively.[117] And because a known rule must exist for a Type 2 Violation to occur, the same is true of Type 2 Violations.[118] Accordingly, the expected utility of a decision will be the same under both Thin Conception Conformity and Type 2 Violations.[119]

What differentiates Thin Conception Conformity from Type 2 Violations is that the actors' beliefs about the chances of state action will be reliable in the former but not in the latter. Assume Thin Conception Conformity obtains. Where the actor bases her beliefs about the chances a decision will result in state action on her knowledge of the rules, those beliefs will be accurate. Where she believes that a decision has a 0% chance of not resulting in state action, no state action will in fact occur, and where she believes that it has a 100% chance of resulting

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115 Nevertheless, my arguments here can be extended to the wider sense of compliance as well.

116 Contrast this claim with Matthew Kramer's appeal to decision theory in arguing that individuals will have greater incentives to comply with the law where the rule of law is adhered to than where it is not. See Matthew Kramer, *The Big Bad Wolf: Legal Positivism and its Detractors*, 49 American Journal of Jurisprudence, no. 1 (2004), 1–10. My analysis differs from Kramer's by, among other things, examining the expected utility of compliance rather than just the probability of sanctions and by appealing only to traditional (rationalist) decision-theoretic assumptions. Cf. *id.*

117 See *supra* note 94.

118 **Type 2 Violation**

(1) $P(d|a) = 0$ *or* 1

(a) $P(d|a) = 0$ *or* 1

(i) $d \in Permitted \rightarrow P(d|Sanction) = 0$

(ii) $d \in \neg Permitted \rightarrow P(d|Sanction) = 1$

119 $EU(d)$ *if* Thin Conception Conformity $= EU(d)$ *if* Type 2 Violation

in state action, state action will in fact occur.[120] With regards to sanctions, where a decision is permitted it will be true both that the actor will believe that there is a 0% chance of sanctions if she makes that decision and that no sanctions will in fact occur upon making it, whereas the opposite will be true if it is prohibited.[121]

By contrast, where a Type 2 Violation occurs and the actor relies on her knowledge of the content of the rules in forming her beliefs about the chances her decision will result in sanctions, those beliefs will be inaccurate. Thus where she believes that a decision has a 0% chance of not resulting in state action because it is classified as permitted, that decision will nevertheless result in sanctions; and where she believes that it has a 100% chance of resulting in sanctions because it is prohibited, it will in fact not result in sanctions.[122]

Imagine now that a Type 2 Violation has occurred. Thus an actor believed that some decision had a 100% probability of resulting in sanctions (because it was classified as prohibited) and yet it did not result in sanctions, or she believed it had a 0% probability of resulting in sanctions (because it was classified as permitted) and yet it did result in sanctions. If she is rational, she will update her beliefs in light of this new evidence.[123] Specifically, that evidence will undermine either her prior belief that the probability of sanctions given some decision is 0% if that decision is permitted or her prior belief that the probability of sanctions given a decision is 100% if it is prohibited.

Thus after a Type 2 Violation occurs with regards to a permitted decision, she rationally must now believe that the probability a permitted decision will result in sanctions will be *greater than* 0%, and after a Type 2 Violation occurs with regards to a prohibited decision, she rationally must now believe that the

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120 Thin Conception Conformity

(2) $[(P(d|a) = 0)\ and\ d \rightarrow \neg a]\ or\ [(P(d|a) = 1)\ and\ d \rightarrow a]$

121 Thin Conception Conformity

(2) $([P(d|a) = 0)\ and\ d \rightarrow \neg a] or [(P(d|a) = 1) and\ d \rightarrow a]$

(a) $P(d|a) = 0)\ and\ d \rightarrow \neg a$

(i) $[d \in Permitted \rightarrow (P(d|Sanction) = 0)]\ and\ d \rightarrow \neg Sanction$

(b) $([P(d|a) = 1]\ and\ d \rightarrow \neg a$

(i) $[(d \in \neg Permitted \rightarrow P(d|Sanction)) = 1]\ and\ d \rightarrow Sanction$

122 Type 2 Violation

(2) $(P(d|a) = 0)\ and\ d \rightarrow a] or [(P(d|a) = 1)\ and\ d \rightarrow \neg a]$

(a) $(P(d|a)) = 0\ and\ d \rightarrow a$

(i) $[(d \in Permitted \rightarrow P(d|Sanction)) = 0]\ and\ d \rightarrow Sanction$

(b) $(P(d|a) = 1)\ and\ d \rightarrow \neg a$

(i) $[(d \in \neg Permitted \rightarrow P(d|Sanction)) = 1]\ and\ d \rightarrow \neg Sanction$

123 Let "$P(d|Sanction)^{\star}$" be the actor's updated beliefs about the probability of sanctions.

probability a prohibited decision will result in sanctions will be *less than* 100%.[124] By contrast, where Thin Conception Conformity obtains, actors will not be confronted with evidence conflicting with their prior belief that permitted decisions have a 0% probability of resulting in sanctions or their prior belief that prohibited decisions have a 100% probability of resulting in sanctions. Thus, *cet. par*, where Thin Conception Conformity obtains, rational actors will retain their prior beliefs.[125]

Assuming as before that actors prefer no sanctions to sanctions, because the updated probability of sanctions given some decision will thus be *lower* where it is permitted and Thin Conception Conformity obtains than where it is permitted and a Type 2 Violation has occurred, so too will the updated expected utility of that decision[126] be *higher* under the former circumstances than the latter. [127] And because the updated probability of sanctions given a decision will be *higher* where it is prohibited and Thin Conception Conformity obtains than where it is prohibited and a Type 2 Violation has occurred, so too will the updated expected utility of that decision be *lower* under the former circumstances than the latter. [128] As such, all things being equal, decision theory predicts that actors will be more likely to make permitted decisions and/or not make prohibited decisions where Thin Conception Conformity obtains than where a Type 2 Violation occurs.

4.4 Respect for dignity

> [O]bservance of the rule of law is necessary if the law is to respect human dignity.
>
> Joseph Raz.[129]

At least within contemporary legal philosophy, the claim that the thin conception advances the aim of respect for human dignity owes largely to the work of Lon Fuller.[130] Whereas Fuller claimed that conformity to the thin conception

124 If Type 2 Violation,
$[d \in Permitted \rightarrow P(d|Sanction)^* > 0]$ *or* $[d \in \neg Permitted \rightarrow P(d|Sanction)^* < 1]$

125 If Thin Conception Conformity,
$[d \in Permitted \rightarrow P(d|Sanction)^* = 0]$ *and* $[d \in \neg Permitted \rightarrow P(d|Sanction)^* = 1]$

126 Call this "$EU(d)^*$".

127 $EU(d)^*$*if* Thin Conception Conformity *and* $d \in Permitted >$ $EU(d)^*$ *if* Type 2 Violation *and* $d \in Permitted$.

128 $EU(d)^*$*if* Thin Conception Conformity and $d \in \neg Permitted <$ $EU(d)^*$ *if* Type 2 Violation *and* $d \in \neg Permitted$.

129 Raz, *supra* note 13, p. 221.

130 For a helpful overview of the relationship between dignity and the rule of law in Fuller's thought, see David Luban, *The Rule of Law and Human Dignity: Re-examining Fuller's Canons*, 2 Hague Journal on the Rule of Law, no. 1 (2010), 29–47.

carries with it "a certain built-in respect for human dignity,"[131] he insisted that every violation of the thin conception "is an affront to man's dignity."[132]

However, any attempt to straightforwardly evaluate the relationship between the rule of law and respect for human dignity is complicated by the fact that there is at least as many – and perhaps even (far) more – differing views on how to understand what is meant by the latter phrase as there are of the former. Indeed, as Waldron has recently suggested, the idea of dignity is also likely best characterized as an essentially contested concept.[133]

But for our purposes, we can put aside the question of *what is meant* by claims that conformity to the thin conception advances respect for dignity, and focus instead just on *the ways* in which it has been claimed to advance this aim. And, again following Raz, we can distinguish between two distinct ways the thin conception has been claimed to advance respect for dignity, corresponding to the distinction between Type 1 and Type 2 Violations.[134]

According to Raz, one distinctive way Type 1 Violations disrespect human dignity is by "restricting people's ability to plan for their future."[135] "Respecting human dignity," he claims, "entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future."[136] And the Uncertainty Effect of Type 1 Violations no doubt interferes with people's ability to plan their lives. Where Type 1 Violations occur, people are unable to confidently determine which of their actions will or will not trigger state sanctions or benefits. By contrast, where conformity to the thin conception obtains, people will be able to perfectly predict what the state's response to their choices will be and act just according to their assessment of the costs and benefits of state action or its absence.

Meanwhile, Raz observes that Type 2 Violations are even more disrespectful of human dignity.[137] Rather than interfere with people's ability to reliably plan

131 Fuller, *A Reply to Professors Cohen and Dworkin*, 10 Villanova Law Review, no. 5 (1965), 655–666, p. 665.

132 See Fuller (1969), *supra* note 9, p. 162.

133 See Jeremy Waldron, "Is Dignity the Foundation of Human Rights?", in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds.), *The Philosophical Foundations of Human Rights* (Oxford University Press, 2015), 117–137, pp. 122–123.

134 See Raz, *supra* note 13, pp. 221–222.

135 See *id*., p. 221. Another way is by creating the risk that power will be exercised arbitrarily. See *id*.

136 See *id*., p. 221; see also Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*, 2 Ratio Juris, no. 1 (1989), 79–96, p. 84–85; Finnis (2011), *supra* note 48, pp. 270–273.

137 See Raz (2009), *supra* note 13, p. 222.

their lives merely due to uncertainty about the consequences of their actions, the Frustrated Expectations Effect creates an additional risk that they will be manipulated in making their plans: "one is encouraged innocently to rely on the law and then that assurance is withdrawn and one's very reliance is turned into a cause of harm to one."[138] Yet where the Thin Conception obtains, at least with regards to the state's response to one's actions, one's reliance on the rules will lead to an accurate prediction of the consequence of any given action. State measures to encourage or discourage forms of conduct will not be manipulative, but instead will communicate the true costs and benefits of decisions to actors before their decisions are made. As such, Waldron observes, conformity to the thin conception "work[s] by using, rather than short-circuiting, the agency of ordinary human individuals."[139]

In addition to its relevance for evaluating the thin conception's role in economic growth and legal compliance, decision theory allows us to examine these claimed connections between the thin conception and respect for human dignity in a new light.

Consider Thin Conception Conformity first. Recall from Section 3.2 that where Thin Conception Conformity obtains the probability state action will occur given some decision will be either 0% or 100%.[140] Recall also that the expected utility of a decision is calculated by first multiplying the utility of the various sets of outcomes a decision may result in by the probabilities they will occur, and then by summing those amounts.[141] And for present purposes, let us confine our attention now just to state action as the outcome of interest.[142]

Where Thin Conception Conformity obtains, we are able to simplify our calculations of expected utility as they encompass the prospects of state action. Holding all other factors constant, where the probability of state action is 100% given a decision, it follows that the expected utility of that decision will simply equal the utility of the presence of the state action at hand.[143] By contrast, where the probability of state action is 0% given a decision, it follows that the expected utility of that decision will simply equal the utility of the absence of the state action at hand.[144]

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138 See *id.*; see also Finnis (2011), *supra* note 48, pp. 272–273; Raz (2012), *supra* note 13, pp. 206–207.

139 See Waldron (2012), *supra* note 3, p. 206.

140 **Thin Conception Conformity**

(1) $P(d|a) = 0$ *or* 1

141 $EU(d) = P(d|O)U(O) + [1 - P(d|\neg O)]U(\neg O)$

142 $EU(d) = P(d|a)U(a) + [1 - P(d|\neg a)]U(\neg a)$

143 $EU(d) = U(a)$

144 $EU(d) = U(\neg a)$

As such, with regards to state action the expected utility of a decision becomes wholly a function of the utility of such action or its absence. In effect, the decision faced by the actor confronted becomes like the pure question of rational choice we encountered at the beginning of Section 3.1. The member of the state need only rationally take into account the utility of any sanctions or benefits that her choice will or will not result in when considering how the prospects of state action bear on her decision.

For example, imagine that a member of a state is confronted with the choice to express her opinion on some controversial public matter. Where Thin Conception Conformity obtains, that expression will either be permitted or prohibited. If it is permitted, the probability that expressing her opinion will result in sanctions by state officials will be 0%. And if it is prohibited, the probability that expressing her opinion will result in sanctions by state officials will be 100%. Holding all other factors constant, under such circumstances she can take into account the utility of state sanctions or their absence directly and make her decision whether to express her opinion with certainty that sanctions either will or not occur.

By contrast, this ability will not be available to her where a Type 1 Violation occurs. Recall from Section 3.2 that the probability that state action will occur given a decision will necessarily be more than 0% and less than 100% where a Type 1 Violation occurs.[145] The member of the state thus must also take into account that probability (whatever it may be) that state action will or will not occur. Accordingly, her decision is necessarily *not* like the question of pure rational choice with regards to state action. Unlike Thin Conception Conformity, where a Type 1 Violation occurs the expected utility of a decision necessarily will *not* equal the utility of state action or the lack thereof.[146] In our example, where a Type 1 Violation occurs the member of the state cannot just take into account the utility of sanctions or their absence when deciding whether to express her opinion. Rather, she also must factor into her decision the probability that expressing her opinions will or will not result in sanctions.

Turn now to Type 2 Violations. Recall that Type 2 Violations are like Thin Conception Conformity in that the probability of state action given a decision will be 0% or 100%.[147] Accordingly, as with Thin Conception Conformity, all things being equal, the expected utility of a decision will equal the utility of

145 Type 1 Violation
(1) $0 < P(d|a) < 1$

146 $EU(d)$ *if* Type 1 Violation $\neq U(a)$ *or* $U(\neg a)$

147 Type 2 Violation
(1) $P(d|a) = 0$ *or* 1

state action or its absence.[148] But because an actor's beliefs about the prospects of state action will be *accurate* where Thin Conception Conformity obtains and *inaccurate* where a Type 2 Violation occurs, so too will her calculations of expected utility be accurate under the former circumstances and inaccurate under the latter.

If Thin Conception Conformity obtains, where the probability a given decision will result in state action is 100%, state action will in fact occur if it is performed, and where the probability it will result in state action is 0% then state action will not in fact occur if it is performed.[149] As such, all things being constant, the *actual* utility of the decision will thereby equal its *expected* utility.[150] Applied to our example, not only can a member of the state deciding whether to express her opinion rationally consider only the utility of sanctions or their absence in assessing the relevance of state action to her decision, *cet. par.*, her expectations of utility will equal the actual utility her decision will yield. Where she expects that the state will sanction her for expressing her opinion, her assessment of the impact of that sanction on her utility will be accurate, as will be her assessment where she expects that the state will not sanction her.

By contrast, if a Type 2 Violation occurs, where the probability a given decision will result in state action is 100%, state action will not in fact occur if it is performed, and where that probability is 0%, state action will in fact occur if it is performed.[151] Thus the actual utility of her decision will necessarily *not* equal its expected utility.[152] Within the context of our example, unlike Thin Conception Conformity, although the member of the state deciding whether to express her opinion will act rationally from her standpoint in considering only the utility of sanctions or their absence with regard to the relevance of state action, her calculations of expected utility will be incorrect. The actual utility yielded by decision to express her opinion will be less than its expected utility where the state would sanction her despite her belief that there is a 0% probability of sanctions, and will be greater than its expected utility where the state would not sanction her despite her belief that there is a 100% probability they will sanction her.

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148 $EU(d)$ *if* Type 2 Violation $= U(a)$ *or* $U(\neg a)$

149 Thin Conception Conformity

(2) $([P(d|a) = 0)$ *and* $d \rightarrow \neg a]$ *or* $[(P(d|a) = 1)$ *and* $d \rightarrow a]$

150 $U(d) = EU(d)$ *if* Thin Conception Conformity.

151 Type 2 Violation

(2) $[(P(d|a) = 0)$ *and* $d \rightarrow a]$ *or* $[(P(d|a) = 1)$ *and* $d \rightarrow \neg a]$ a]

152 $U(d) \neq EU(d)$ *if* Type 2 Violation

These conclusions provide a novel way of thinking about claims that a state's officials treat its members with a greater degree of respect where Thin Conception Conformity obtains than where a Type 1 or Type 2 Violation occurs. For one, it provides us with a fresh perspective on how Type 1 Violations disrupt a state's members' ability to plan their lives compared to Thin Conception Conformity. Specifically, whereas the expected utility of a decision as it concerns state action will wholly be a function of the utility of the state action in question where Thin Conception Conformity obtains, this will not be true of Type 1 Violations. Where Type 1 Violations occur, individuals will necessarily lack the ability to rationally consider just the sanctions or benefits their actions will or will not result in, but will instead need to also consider the probabilities that those sanctions or benefits will occur. In situations where the rationality of an actor's decision turns on those probabilities – e.g., where our actor would not express her opinion if the probability of sanctions was 100%, but, given her preferences, it would be rational for her to do so if it is 90%, or 80%, and so on – Type 1 Violations will thus lead the actor to not make the decision which would otherwise best satisfy her preferences.

Likewise, decision theory also provides us with a new understanding of how Type 2 Violations disrespect dignity. Prior to a Type 2 Violation, in assessing the expected utility of a decision, actors rationally consider only the utility of state action or its absence, not the probability that it will or will not occur. But in spite of this, where a Type 2 Violation occurs the expected utility of her decision will not equal the actual utility produced by her decision. In our example, where expressing her opinions will yield her greater utility provided sanctions would not occur, a Type 2 Violation will lead her to make a decision yielding less utility than she expected. And where refraining from expressing her opinions will yield her less utility provided sanctions would occur, a Type 2 Violation will likewise lead her to make a decision yielding less utility than she expected.

5 Conclusion

In this article, I have attempted to show how a decision-theoretic analysis of the thin conception of the rule of law sheds light on the rule of law's role in international development. I have argued first that, *cet. par.*, actors will have less incentive to engage in pro-growth conduct and/or more to engage in anti-growth conduct where Type 1 Violations occur than where Thin Conception Conformity obtains and pro-growth conduct is permitted and/or satisfies some power-conferring rule(s), and where anti-growth conduct is prohibited and does not satisfy any power-conferring rules. Second, I have argued that, *cet. par.*,

actors will have less incentive to comply with the law and/or more to not comply where Type 2 Violations occur than where Thin Conception Conformity obtains. And third I have argued that, *cet. par.*, actors will have less incentive to make decisions that will yield them greater actual utility, and/or greater incentive to make decisions that will yield them less actual utility where Type 1 or Type 2 Violations occur than where Thin Conception Conformity obtains. Thus, all things being equal, this analysis predicts: (1) a negative relationship between Type 1 Violations and economic growth; (2) a negative relationship between Type 2 Violations and legal compliance; and (3) a negative relationship between Type 1 and Type 2 Violations and the amount of utility members of the state's decisions will yield them.

It bears emphasizing that my central claim in this article is modest. Again, it is by no means my claim here that conformity with the thin conception is a sufficient condition for the advancement of economic growth, legal compliance, and respect for dignity. This is particularly clear in the context of economic growth, as my reasoning explicitly presupposed that the rules exhibited certain content. The conclusions drawn there would have obviously been very different if we instead assumed that pro-growth conduct was prohibited, anti-growth conduct was permitted, or both. So too does the degree to which a state's officials treat its members with respect depend not only on members' accurate expectations about whether or not state action will occur if they engage in certain conduct, but which kinds of conduct will or will not result in which kinds of state action. For instance, to return once more to our example from Section 4.4, a state will of course treat its members disrespectfully where it sanctions them for expressing their opinions on controversial matters regardless of whether it communicates to them that doing so is prohibited.

Nor is it my claim that high levels of development cannot occur in the presence of significant violations of the thin conception. As Frank Upham observes, the example of the United States amply demonstrates that this is not the case given the politicization of our judiciary as well as the degree of pluralism (and thus uncertainty) brought about by our federalist system.[153] Moreover, I have made no attempt to defend here the very strong claims of Hayek, Fuller, and Raz that the thin conception is a *necessary* condition for, respectively, a well-functioning market economy, proper incentives for legal compliance, and state respect for its members' dignity.

Instead, my aim has simply been to show how a decision-theoretic analysis implicates a distinctive role for conformity to the thin conception in forwarding a

153 See Upham (2005), *supra* note 10; see also Brian Tamanaha, *The Rule of Law and Legal Pluralism in Development*, 3 Hague Journal on the Rule of Law, no. 1 (2011), at 15–16.

state's enjoyment of economic growth and legal compliance, as well as the extent to which it treats its members with respect. And that analysis suggests that even if we were to assume (implausibly) that a state's officials would always in fact exercise their discretion in pro-growth, pro-compliance, and pro-dignity ways, that state could nevertheless enjoy still greater rates of economic growth and legal compliance, and it would treat its members more respectfully, should its officials' pro-growth, pro-compliance, and pro-dignity actions be mandated by rules rather than left to their discretion.

Of course, even this more modest claim is open to reasonable objection. For one, the simplifying assumptions made in this analysis have led it to overlook a number of important factors relevant to each of these goals. For instance, my analysis of the significance of the thin conception for legal compliance did not take into account the extent to which a state might be able to disrupt the free flow of information regarding its actions. It has also assumed that compliance with legal rules and a state's imposition of sanctions and conferring of benefits are *binary* matters, in that actors are faced by a choice just to conform to the requirements of rule or not and that officials only impose sanctions or confer benefits or not. Yet this is often not the case, and a fully adequate analysis would need to take into account the fact that actors are often confronted instead with the further question of the extent to which they ought to attempt to conform to the rules given the size of the sanctions or benefits at hand.[154]

And given that perfect adherence to the thin conception is impossible in the real world,[155] a fully adequate analysis would also need to take into account the extent of thin conception violations rather than simply examining their effects in comparison to a state of affairs in which no thin conception violations at all occur. Nor has this analysis taken into account the degree of the state's capacity to detect rule compliance and impose sanctions or confer benefits on its members,[156] or the effect on a member's incentives of her expectations of the actions of other members of the state, not just officials.[157] Relatedly, a decision-theoretic analysis will necessarily fail to capture the implications of the strategic relationship in which members of a state stand *vis-à-vis* its officials. After all, the actions of a state's officials are shaped by their expectations of how its members will act

154 Cf. John Calfee and Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 Virginia Law Review, no. 5 (1984), 965–1003; Richard Craswell and John Calfee, *Deterrence and Uncertain Legal Standards*, 2 Journal of Law, Economics, and Organization, no. 2 (1986), 279–303.

155 This point is stressed by Raz (2009), *supra* note 13, p. 222.

156 See Marcelo Bergman, *The Rule, The Law, and the Rule of Law: Improving Measurements and Content Validity*, 33 Justice System Journal, no. 2 (2012), 174–194.

157 Cf. Bergman (2009), *supra* note 3.

as well.[158] To capture these phenomena, we must in the end abandon decision theory in favor of a game-theoretic analysis.[159]

Most saliently, any predictive application of rational choice, decision, and game theory must take notice of the important and growing body of literature in behavioral economics undermining the rationalistic assumptions on which they depend.[160] This research has revealed that people often act contrary to such assumptions, exhibiting, among other things, risk aversion, systematic cognitive biases, and reliance on simple heuristics and norms rather than calculations of expected utility.[161] This literature is not just relevant to the issue of economic growth, either, but has been applied to questions concerning legal compliance and respect for dignity as well. For instance, an experiment by Tom Baker, Alon Harel, and Tamar Kugler found that participants were generally less likely to perform an action that they were told would result in a fine given greater levels of uncertainty in the size of the fine or the chance of being caught, a finding which the authors attributed to risk aversion.[162] Meanwhile, in her influential recent book, *Against Autonomy*, Sarah Conley has appealed to this literature to defend paternalistic interventions by states on the basis that people often act inconsistently with their own preferences.[163]

These concerns may seem particularly salient when we recall once again that conformity to the thin conception is undoubtedly not a sufficient condition for growth, compliance, or dignity. What is more, rule governance carries with it an important cost: where officials are constrained by rules, they are necessarily thereby deprived of the flexibility to act on all the various reasons that bear on their action.[164] And we often lack the foresight to predict what all these reasons might be and to formulate our rules accordingly.[165] Thus it is at least an open question whether the degree of flexibility gained by violating the thin conception might permit a state to enjoy higher levels of growth and compliance in the

158 Cf. Fuller (1969), *supra* note 9, p. 219.

159 See, *e.g.*, Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 American Political Science Review, no. 2 (1997), 245–263; Bergman (2009), *supra* note 2; Chen and Deakin (2015), *supra* note 2.

160 For a recent accessible overview of key findings in this literature, see Richard Thaler, *Misbehaving: The Making of Behavioral Economics* (W.V. Norton *and* Company, 2015).

161 See *id*.

162 See Tom Baker, Alon Harel, and Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach,* 89 *Iowa Law Review*, no. 2 (2004), 443–494.

163 See Sarah Conley, *Against Autonomy*: *Justifying Coercive Paternalism* (Cambridge University Press, 2013).

164 See Dworkin (1986), *supra* note 27, pp. 148–150; see also Tamanaha (2004), *supra* note 10, p. 10.

165 See *id*.

real world, as well, perhaps, to see to it that its members' preferences receive greater satisfaction.

Yet there are compelling grounds for thinking it would be misguided to dismiss the instant analysis on the basis of these concerns. First and foremost, whether or not the thin conception has the effects I have predicted is at bottom an empirical matter, not one that can be dismissed (or, of course, confirmed) through *a priori* argument. Further, this analysis has employed only the most basic concepts of decision theory. And though there is no doubt that many of the assumptions employed in decision-theoretic analysis are open to scrutiny, it is far less clear that it is flawed at a fundamental level.[166] Moreover, despite its limits, a decision-theoretic analysis of the rule of law is necessary to determine the correct payoff structure for game-theoretic models.[167]

Nor is it obvious that orthodox decision-theoretic assumptions will not hold in many contexts of interest. For instance, with regards to the issue of legal compliance, Baker, Harel, and Kugler observe that prison populations tend to be significantly less risk averse on average than undergraduate populations like the one which participated in their study.[168] Meanwhile, a survey study by Yuval Feldman and Doron Teichman found that though participants were more likely to report that they would engage in pollution in a depicted scenario involving uncertainty regarding whether their actions would be detected, they were less likely to report that they would do so in a depicted scenario involving uncertainty in the content of the law.[169]

Finally, although I cannot adequately defend this claim here, I believe it would be an error to conclude that the argument for the significance of the thin conception for respecting human dignity ultimately hinges on rationalistic assumptions. This is because that argument does not necessarily depend on the claim that members of a state will enjoy greater preference-satisfaction where thin conception violations occur than where they do not. To think this would be to mistakenly hold that there are no matters over which it is less important that the state help ensure people fare well than that their *own decisions* dictate the course of their life, including their closest interpersonal relationships, religious commitments (or lack thereof), and other features of

166 See Gintis (2009), *supra* note 76, ch. 1.

167 Cf. Rodolfo Sarsfield, *The Bribe Game: Microfoundations of Corruption in Mexico*, 33 Justice System Journal, no. 2 (2012), 215–234.

168 See Baker, Harel, and Kugler (2004), *supra* note 162, p. 485.

169 See Yuval Feldman and Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 New York University Law Review, no. 4 (2009), 980–1022.

their lives that are generally thought to be the subject of their fundamental rights.

From this perspective, rule governance is best thought of not as in tension with the ideal of good and just governance after all, but rather as an essential aspect *of* that ideal. For if a state can only refrain from inducing uncertainty or frustrated expectations about the prospects of state action where it conforms to rules, then so too must it conform to rules in order to not interfere with its members' ability to exercise their fundamental rights freely. Because only by conforming to rules can it then refrain from interfering with their ability to form accurate beliefs about the costs and benefits of the different ways available to them to exercise those rights. And this consideration alone seems to suffice to establish the thin conception's importance for international development. For though there is profound disagreement about what that process and its outcome should look like,[170] all things being equal, a world in which states refrain from interfering with their members free exercise of their fundamental rights would undoubtedly be one that is as respectful of human dignity as can be.

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170 Like the rule of law, the notion of development is itself probably an essentially contested concept. For some observations that support this suggestion, see Lee (2015), *supra* note 10, pp. 2–6.

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